



**CITY OF ANNAPOLIS  
OFFICE OF LAW  
93 Main Street, Suite 300  
Annapolis, MD 21403  
410-263-7954**

**M E M O R A N D U M**

**To: Mayor Joshua J. Cohen  
Alderman Richard E. Israel  
Alderman Frederick M. Paone  
Aldерwoman Classie Gillis Hoyle  
Aldерwoman Sheila M. Finlayson  
Alderman Mathew Silverman  
Alderman Kenneth A. Kirby  
Alderman Ian Pfeiffer  
Alderman Ross H. Arnett, III**

**From: Karen M. Hardwick  
City Attorney**

**Date: February 27, 2012**

**Re: Residency Requirements for Aldermen and Alderwomen**

**Purpose**

At your request, this memorandum provides my guidance on the law governing residency qualifications for sitting members of the Annapolis City Council (the "Council"). As I believe you are aware, the Board of Supervisors of Elections (the "Elections Board") has previously considered its role in determining those qualifications outside the context of a pending election, and for the reasons explained further below, I do agree that the Council, not the Board of Elections, is the tribunal empowered to decide any dispute in this context.

My understanding is that your request is prompted by recent press reports and citizen inquiries. However, I should alert you at the outset that no formal findings of fact are available in the current posture of these reports or inquiries. I accordingly suggest that you consider an appropriate procedure for resolving any ongoing dispute in accordance with the advice provided below. My goal here is to assist the Council in

evaluating how to proceed, and how a Maryland court likely would approach a dispute of this sort.

### **Relevant Law**

In my opinion, the Maryland constitutional home rule system for municipalities authorizes the City to establish residency and other rational qualifications for its elected officials. Md. Const. Art. XI-E, Section 3 (municipal home rule power and authority “to amend or repeal an existing charter or local laws relating to the incorporation, organization, government, or affairs” of the municipal government); *see also* 96 Md. Op. Att’y Gen. 36, 2011 WL 3561892 (Md.A.G.) (2011) (Maryland law does not pre-empt the regulation of municipal elections).

To date, the City has exercised this important power through the adoption of several Charter and Code provisions. Specifically, I call your attention to the following sections as excerpted in pertinent part:

#### **Charter**

#### **Article II, Election of Mayor and Aldermen,**

#### **Sec. 3. - Terms; qualifications for office.**

(c) Aldermen, except those first elected from areas annexed to the city, shall be registered voters in the city for at least one (1) year immediately preceding their election and a registered voter in the ward from which they are elected for at least six (6) months and must have resided in that ward for at least six (6) months immediately preceding the date of the general election.

#### **Sec. 7. - Vacancies.**

(b) The following procedure for the filling of vacancies shall apply whenever a vacancy shall occur with fifteen months or more remaining until the next general election at which members of the city council shall be elected.

(1) In case of the death, resignation, refusal to serve, disqualification of the mayor or of any alderman, or removal out of the city by the mayor, or out of the ward by any alderman, the mayor or acting mayor shall issue a proclamation directing that a special primary election and a special general election be held to fill the vacancy. The mayor or acting mayor shall issue this proclamation within five (5) days after the vacancy occur.

#### **City Code, Section 4.04.010 - Definitions.**

As used in this title, the following terms shall have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

"Residence" means a place of fixed permanent domicile.

Emphasis added.

As a general proposition, Maryland courts ordinarily will not disturb municipal election rules absent a viable claim by voters grounded in a constitutional infirmity. *Compare Town of Glenarden v. Bromery*, 257 Md. 19, 29, 262 A.2d 60, 66 (1970) (court accepted extraordinary municipal charter amendment adopted "by the voting citizens ... arranging for a change in the identity of their political agents and servants"), *with DuBois v. City of College Park*, 286 Md. 677, 691, 410 A.2d 577, 585 (1980) (court rejected municipality's exclusion of college students in determining election districts under State and federal requirements of one person and one vote).

As a legal matter, the residency of an elected official is appropriately considered as a "qualification" that may be required for the official to continue serving in public office. *See* 3 McQuillin Mun. Corp. § 12.65 (3rd ed.) (legal significance of qualification to continue in office based on termination of residency); *also citing Kean v. Rizer*, 90 Md. 507, 45 A. 468 (1900) (highlighting distinction between lapse in qualification for office and failure for municipal councilman to qualify *ab initio*). Therefore, you should note that the City Charter provides an enforcement mechanism relating to judging disputes about such qualifications. Specifically, Article IV, Sec. 6. of the Charter provides in relevant part:

The city council shall be the judge of the election and qualification of its members.

(Emphasis added.) In my view, this general enforcement provision empowers the Council, not the Board of Elections, to resolve qualification disputes related to the residency of its members once they are installed.

### **Legal Analysis of Residency as a Qualification for Office**

Courts in Maryland interpret municipal charter and code provisions following the same "plain meaning" analysis that applies more broadly to the interpretation of statutes. *120 W. Fayette St., LLLP v. Mayor & City Council of Baltimore City*, 413 Md. 309, 331, 992 A.2d 459, 472 (2010) (court construes local ordinances and charters under the same canons of statutory construction that apply to other statutes).

The cardinal principal of this approach is that courts must give effect to whatever is authorized and intended by the relevant charter or code. *Mayor & City Council of Ocean City v. Bunting*, 168 Md. App. 134, 141, 895 A.2d 1068, 1072 (2006) ("the cardinal rule" of municipal charter interpretation is to ascertain the intention of the local legislative body).

Even so, when a statute uses phrases or terms of art that are in common legal usage, the courts ordinarily will conclude that those phrases or terms of art were actually intended by the body enacting the charter or code provision in question. *See*

*Trinity Assembly of God of Baltimore City, Inc. v. People's Counsel for Baltimore County*, 407 Md. 53, 92, 962 A.2d 404, 427 (2008), quoting *United States v. Dodson*, 291 F.3d 268, 271 (4th Cir.2002) ("Courts presume, in interpreting statutes, that the law uses familiar legal expressions in their familiar legal sense.") (Internal citations and quotation omitted).<sup>1</sup>

In the context of this inquiry, the Charter imposes a two-part residency requirement. First, a candidate for alderman or alderwoman must have "resided in that ward for at least six (6) months immediately preceding the date of the general election." Charter, Article II, Sec. 3(c). Second, it provides that "[i]n the case of removal. . . out of the ward by any alderman . . . the mayor or acting mayor shall issue a proclamation directing that a special primary election and a special general election be held to fill the vacancy." Charter, Article II, Sec. 7(b)(1). *See also* Charter, Article II, Sec. 7(a) (for alternate procedure when vacancy occurs within fifteen (15) months of general election). No other provisions of the City Charter or Code specifically reference the residency of an alderman or alderwoman.

In my view, the residency qualification that applies both to candidates and elected City aldermen and alderwomen is found in the phrase of art: "fixed permanent domicile."<sup>2</sup> This conclusion is based on the definition contained in the Section 4.04.010 of the Code referenced above. That phrase of art--"fixed permanent domicile"--in turn, is identical to the one often used by Maryland courts in questions of residency, and the factors that go into its determination are well-settled.

In several cases that involve language identical or similar to the City Charter and Code, the Maryland appellate courts have taken up the question of residency requirements for various elected officials. In so doing, the courts have carefully distinguished among three different concepts that reflect the complexity of normal living arrangements: residency, domicile and abode.

In general, an individual becomes a legal "resident" by meeting positive, statutory requirements that may be quite different for different purposes. For example, the City

<sup>1</sup> *See also* City Code, Sec. 1.04.020.A (In the interpretation and construction of this code, all words, other than those specifically defined in this section or specifically defined elsewhere in the Charter of the City or in this code, have the meanings or definitions ordinarily ascribed to them as set forth in Webster's Third New International Dictionary (1981 Edition), unless any such meaning or definition is inconsistent with the acts of the legislature, the decisions of the courts of the State, law or with the manifest intent of the City Council, or the context clearly requires otherwise) (emphasis added).

<sup>2</sup> Although it is possible for a municipality to distinguish the meaning of residency for purposes of qualifying for election versus qualifying to continue in office, or to create a statutory vacancy in office for an absence over a certain period of time or for certain purposes, I opine the City has not chosen to do so.

For example, Anne Arundel County effectively has adopted a special rule to create a statutory vacancy if a councilmember is expected to be absent from the County for more than 180 days during a military deployment. Charter of Anne Arundel County at § 205(h) (effectively disqualifying a member of the Council from "on the date that begins active federal or State service based on an order calling the member . . . to active service for a period of time exceeding 180 consecutive days"). In that case, without dealing directly with residency or qualification requirements, the County Charter nevertheless "deems" that a vacancy has occurred in the public office. *Id.* By contrast, the City has not adopted any special residency or vacancy rule of this sort.

Code proscribes requirements for “resident” parking that are different from the “fixed permanent domicile” requirements for sitting aldermen and alderwomen.<sup>3</sup> In other words, the concept of legal residency depends entirely on the governing law and the context in which the question is posed.

By contrast, an individual’s “domicile” is a legal term of art normally developed by courts. Although the term is sometimes confused or used interchangeably with residency, in my opinion, the better view was expressed by the Court of Appeals that:

Although a person may have several places of abode or dwelling, he or she “can have only one domicile at a time.” *Bainum v. Kalen*, 272 Md. 490, 496-497, 325 A.2d 392, 395-396 (1974), quoting *Shenton v. Abbott*, *supra*, 178 Md. at 530, 15 A.2d at 908.

“Preliminarily, a question has been raised in this case concerning the meaning of the term ‘resided’ in Article III, Section 9, of the Maryland Constitution. It is suggested that the word ‘reside’ or its equivalent, as used in constitutional or statutory provisions setting forth qualifications for political office or voting, means actual physical presence or abode rather than domicile.

“From *Thomas v. Warner*, 83 Md. 14, 20, 34 A. 830 (1896), and *Howard v. Skinner*, 87 Md. 556, 559, 40 A. 379 (1898), until the present, this Court has consistently held that the words ‘reside’ or ‘resident’ in a constitutional provision or statute delineating rights, duties, obligations, privileges, etc., would be construed to mean ‘domicile’ unless a contrary intent be shown.”

Blount v. Boston, 351 Md. 360, 365, 718 A.2d 1111, 1113-14 (1998).

It also is important to note that under Maryland law, domicile is a unitary concept; the “meaning of domicile and the basic principles for determining domicile have been the same in this State regardless of the context in which the issue of domicile arose.” Blount, 351 Md. at 367, 718 A.2d at 1115, quoting *Toll v. Moreno*, 284 Md. 425, 438, 397 A.2d 1009, 1015 (1979) (eligibility for in-state tuition determined by state law of domicile, which is the same determination in any context, whether for divorce proceedings, school district assignments, qualifications for office, etc.).

Following these legal constructs, the Maryland appellate courts have developed a number of factors to determine an individual’s domicile. A summary of these factors is provided as follows:

- A person may have more than one physical place of abode, but only one legal domicile.

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<sup>3</sup> See City Code, Sec. 2.32.020.C (“A resident is only eligible for a residential parking permit when the resident’s address is located on one of the streets identified to be within a residential parking district.”).

- The controlling factor in determining a person's domicile is his intent.
- A person's statements of his or her intent as to domicile are admissible and relevant. However, intent is best shown by objective factors--that is, by deeds rather than words.
- The two most important objective factors evidencing a person's intent are where the person lives and where the person votes.
- However, no one factor is dispositive. A myriad of factors may be considered, including:
  - the paying of taxes and statements on tax returns;
  - the ownership of property;
  - where the person's children attend school;
  - the address at which one receives mail;
  - statements as to residency contained in contracts or other documents;
  - statements on licenses or other governmental documents;
  - where furniture and other personal belongings are kept;
  - where one banks;
  - membership in professional, religious and social organizations; and
  - any other factors revealing contact with one or the other jurisdiction.

*See, e.g., Oglesby v. Williams*, 372 Md. 360, 812 A.2d 1061 (2002) (candidate for state's attorney was domiciled in county other than the one in which he sought election where he had not completed construction on new home and moved in); *Blount v. Boston*, 351 Md. 360, 718 A.2d 1111 (incumbent state senator maintained his original domicile in Baltimore City even though he had several places of abode in other counties); *Dorf v. Skolnik*, 280 Md. 101, 371 A.2d 1094 (1977) (statements on driver's license, renter's insurance policy, credit cards, tax returns establish domicile in Baltimore County, not Baltimore City as claimed); *Bainum v. Kalen*, 272 Md. 490, 325 A.2d 392 (1974) (candidate not domiciled in Maryland for two preceding years in light of Michigan voting, voter registration, automobile registration, driver's license, and tax returns); *Gallagher v. Board of Supervisors of Elections & Theodore R. McKeldin*, 219 Md. 192, 148 A.2d 390 (1959) (Maryland governor and Baltimore mayoral candidate held to be domiciled in Baltimore City because long-standing intent to return to Baltimore at end of term and continuing contacts there outweighed living in Government House for eight years, registering and voting in Annapolis, statements on tax returns, address on driver's license and vehicle registration).

Thus, an individual may have multiple abodes but only one domicile. This makes the legal question of domicile one that is highly fact-specific and impossible to resolve with reasonable certainty while any material facts remain in dispute.

### **Abandonment of Domicile**

As noted above, the second part of the residency requirement for aldermen and alderwomen is found in Article II, Section 7 of the Charter. This section provides that “removal” “out of the ward” by any alderman or alderwoman creates a vacancy and requires that within five (5) days of that vacancy the mayor issue a special proclamation directing that a special primary election and a special general election be held to fill the vacancy if the vacancy is created fifteen (15) months or more prior to the general election. Article II, Sec. 7(b). The Charter establishes a separate appointment process if the vacancy occurs within fifteen (15) months of the general election. *See* Article II, Sec. 7(a).

Maryland courts have held that, for the purpose of election qualifications, the term “removal” must be understood to mean “abandonment” of a domicile. Specifically, the Court of Appeals held in *Bainum v. Kalen* that “it is a fundamental rule that, in order to effect a change of domicile, there must be an actual removal to another habitation, coupled with an intention of remaining there permanently or at least for an unlimited time.” 272 Md. at 498, 325 A.2d at 397. *Accord Gallagher v. Board of Sup’rs of Elections*, 219 Md. at 208, 148 A.2d at 399 (same). In examining whether a person intends to change his or her domicile, courts require evidence of (1) an intent to abandon the first domicile, and (2) an intent that the “new place of habitation be his or her domicile.” *Blount v. Boston*, 351 Md. at 371-72, 718 A.2d at 1117-18.

Or, as the Court of Appeals explained in one of its earlier cases, “the mere intention to acquire a new domicil[sic] without the fact of an actual removal avails nothing, neither does the fact of a removal without the intention.” *Ringgold v. Barley*, 5 Md. 186, 193 (1853). “Even when an individual leaves the area in which he had established a domicile, that area remains his domicile until a new one is clearly established.” *Blount v. Boston*, 351 Md. at 371-72, 718 A.2d at 1117-18 (internal citations omitted).

If the law were otherwise, and an “uninterrupted, actual and physical presence” were the standard, few would be eligible to seek and retain office. Under that standard, an elected official would risk forfeiting his or her office simply by virtue of a vacation to France or South Africa, an extended stay at Johns Hopkins Hospital, a trip to care for an ailing family member, a protracted dispute with a landlord, or several weeks (or even months) spent caring for a new child or grand-child. *See Gallagher*, 219 Md. at 208, 148 A.2d at 399. In my opinion, the Maryland courts would decline to find that the framers of the City Charter intended such a draconian result to flow from the ordinary ups and downs of normal living.

### **Process for Determining a Vacancy**

When read together with the benefit of Maryland common law, the two Charter sections on qualifications--Article II, Sec. 3, which requires that a candidate have resided in the aldermanic ward s/he seeks to represent for the preceding six (6) months, and Article II, Sec. 7, which provides that a vacancy is created when an alderman or alderwoman removes himself or herself from the ward by abandoning his or her domicile there--call upon the mayor and the city council to determine whether the question of residency is disputed.

If an alderman or alderwoman advises the mayor in writing that s/he is moving out of the ward or the city for an indefinite period, without the intention of returning, the process is straightforward. The mayor would declare the existence of a vacancy and call for a special election or appointment depending upon the length of time before to the next general election. *Charter*, Article II, Sec. 7.

On the other hand, if there exists a factual dispute regarding the "fixed permanent domicile" of a sitting alderman or alderwoman and whether s/he has "abandoned" that domicile within the meaning of Maryland law, the Charter requires that the City Council make factual findings about whether the alderman or alderwoman remains qualified to hold office. Charter, Article IV, Sec. 6. To find that an alderman or alderwoman is disqualified such that s/he should be expelled requires "the unanimous concurrence of the entire city council, the member affected not being entitled to participate in the decision." *Id.*

### **Conclusion**

By City Charter, the City Council is the body empowered to "judge the qualifications of its members." In light of the foregoing legal analysis, the threshold questions before the Mayor and Council are whether (a) the Mayor has been presented with undisputed evidence of an alderman or alderwoman's change in domicile such that a vacancy has been created; and (b) if not, whether there is sufficient basis for initiating an adjudicative process on a member's qualifications as envisioned by the Charter. Please let me know how you would like to proceed.

K.M.H.